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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 223.

OHIO WATER SERVICE COMPANY,
Petitioner,

vs.

THE MAHONING VALLEY SANITARY DISTRICT,
Respondent.

BRIEF OF THE MAHONING VALLEY SANITARY DISTRICT OPPOSING CERTIORARI.

ESSENCE OF THE DISTRICT'S RESPONSE.

The respondent, The Mahoning Valley Sanitary District, maintains that the record does not justify consideration of the merits of the federal questions which the petitioner purports to present; and that the Supreme Court of Ohio did not decide the appeal to it in a way contrary to applicable decisions of this Court. Only a question of Ohio state court procedure, based upon Ohio statutes, was decided by the Supreme Court of Ohio. The claim that such statutes grant unjustifiable unilateral rights of appeal is not now presentable.

Proper analysis of the record will furnish a basis only for a single question, if any, i.e. as to whether the Constitution of the United States guarantees that litigants in state courts shall have rights of appeal after trials in courts of original jurisdiction. This Court has many times answered in the negative.

MAJOR PROCEDURAL FACTS.

Respondent, The Mahoning Valley Sanitary District, was formed in 1926 under the Sanitary District Act of Ohio (108 Ohio Laws 634; Ohio Revised Code, Sections 6115.01 to 6115.99) and thereupon became "a political subdivision and public corporation of the state." (Ohio R. C. 6115.03F and 6115.08) It has been supplying water to the two cities comprising the district, the City of Youngstown in Mahoning County and the City of Niles in Trumbull County, and they, in turn, have sold surplus water to areas located outside the district. The constitutionality of the Act was, in 1929, upheld generally notwithstanding claims of violation of due process and equal protection as guaranteed by the federal constitution. *Shook v. Mahoning Valley Sanitary District,* 120 Oh. St. 449. Appeal to this Court was dismissed by appellant, 281 U. S. 770.

A special court of common pleas organized in accordance with the Sanitary District Act by including one judge from Mahoning County and another from Trumbull County, on May 10, 1950 approved a plan denominated "Amendment No. 1 of the Official Plan of The Mahoning Valley Sanitary District." The amendment is designed to augment the supply of water at an estimated cost of $6,000,000. A board of three appraisers was thereupon appointed as required by Ohio R. C. 6115.29 for the purpose of valuing the property needed for rights of way and appraising benefits and damages that would accrue.

The petitioner objected to the appraisers' report as to benefits, which under Ohio R. C. 6115.48 becomes the basis for apportionment of assessments to finance the cost of such a project, on the ground that it failed to assess any benefits against property outside the territorial limits of the original district. The objections did not claim any dep-

rivation of rights based upon the Constitution of the United States (Petition, pp. 5a-8a).

To resolve a difference of opinion between the two judges of the special court in regard to the first report of the appraisers, the Chief Justice of the Supreme Court of Ohio added a judge of the Court of Common Pleas of Belmont County to the panel of the special court. After hearings about which there is no complaint, the disinterested judge, Judge Belt, from Belmont County, stated:

> "The board of appraisers did not include or appraise any outside territory, which failure upon the part of the board of appraisers, raises an inference at least that no outside lands were benefited. The conclusion of the court is that it is useless to do a vain thing. The court believes that under the situation presented, it would be folly to attempt to take in outside territory." (Petition, p. 17a).
>
> "* * * the court has considered the quantity of water sold by the City of Niles to corporations and individuals outside of its corporate boundaries. The court desires to commend the City of Niles for its activities in that respect. In so doing the City of Niles has been made to prosper by reason of having assets outside its corporate boundaries from which it has greatly profited. The same can be said of the City of Youngstown, in an equal degree." (Petition, pp. 18a-19a).

Another of the judges expressed the same view (Petition, p. 24a), and the third concurred "in toto." (Petition, p. 21a). The court did favor shifting a larger share of the cost to Youngstown and this was done by recasting the roll before approval by the final entry.

Accordingly, the special court, all three judges concurring, on March 19, 1953, approved an amended report of the appraisers by a journal entry quoted in the petition at pages 48a to 54a. Up to that time the only item in the

record made by the petitioner with respect to the Constitution of the United States was a general statement directed to an intermediate order which the special court did later set aside—"10. That the order, judgment and decree of the court of jurisdiction is contrary to law in that it contravenes the Constitution of the state of Ohio and the Constitution of the United States of America." (Petition, p. 30a.)

Appeals by several exceptors including the petitioner herein were docketed in the Court of Appeals for Mahoning County but they were, on July 27, 1953, dismissed by that court (Petition, p. 61a), pursuant to a *per curiam* opinion in which the three judges concurred, saying—

> "Thus the legislature has specifically prescribed that the decree of the court is final and incontestable except from an award for compensation or damages. The jurisdictional court has made no award for compensation or damages to any of the appellants, and it follows that there is no right of appeal in these cases now before us, and such appeals, being numbered 3593, 3594, 3595, 3596 and 3597, are hereby dismissed." (Petition, p. 60a.)

The only federal question raised in petitioner's assignments of error to the Court of Appeals was—

> "* * * that the decree of said court deprives this appellant of its property without due process of law and also deprives it of the equal protection of the laws, all in violation of those rights secured to appellant by the Constitution of the state of Ohio and the Constitution of the United States of America." (Petition, pp. 56a, 58a.)

Petitioner then appealed to the Supreme Court of Ohio on a claim to an appeal as a matter of right and also on condition that motions to certify the record be allowed. The appeals as of right were "dismissed for the reason no

debatable constitutional question is involved in said cause." (Petition, p. 90a). On the same day the motions to certify the record were allowed. (Petition, p. 88a.) Thereafter, petitioner filed assignments of error asserting that the decree of the special court deprived it of property without payment of just compensation and also denied to petitioner the equal protection of laws. (Petition, pp. 65a, 67a.) [Petitioner, *in its brief* to the Supreme Court of Ohio, did not make any argument in support of said assignments of error, i.e., it did not argue that either the decision of the special court or the decision of the Court of Appeals deprived it of any rights guaranteed under the state or federal constitutions. As to its right of appeal, it urged only its construction of Ohio statutes.]

The Supreme Court of Ohio affirmed the judgment of the Court of Appeals, holding that the statute did not grant to petitioner a right to appeal from the decree of the special court. The opinion of Judge Stewart begins by saying—

> "The sole question of law presented in the present cases is whether the Court of Appeals was in error in dismissing the appeals of appellants from the judgment of the court of the sanitary district, which judgment overruled the exceptions of appellants to the appraisal of benefits in connection with the expansion program of the sanitary district and confirmed such appraisal." (Petition, p. 71a.)

The points decided by the Supreme Court of Ohio were, to quote from its syllabus *

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* In 11 *Ohio Jurisprudence*, Courts, Section 144, at pages 796-797, it is said:

> "This rule was adopted in January, 1858, and establishes the rule in Ohio that the syllabus of a supreme court decision states the law. Or, as differently expressed, *the points*

(Continued on following page)

"4. Section 6602-65, General Code (Section 6115.36, Revised Code), provides that approval by a sanitary district court of the provisions of a report of a board of appraisers of a sanitary district, as modified and amended, makes the findings and appraisals comprising such report final and incontestable, and Section 6602-66, General Code (Section 6115.37, Revised Code), prohibits an appeal from any part of the decree of such court except an appeal for a jury trial from an award of compensation or damages, or both." (Petition, p. 68a.)

Nevertheless, the petitioner grasped at expressions in Judge Stewart's opinion (Petition, p. 77a) which refer to a provision that had been in the Sanitary District Act from its beginning, Ohio R. C. 6115.41 and its antecedents, and asked the Supreme Court of Ohio for a rehearing on assertion of there being unconstitutional variances in rights to appeal. The application was promptly denied without opinion. (Petition, p. 91a.)

FURTHER REVIEW IS, RESPONDENT SUBMITS, NOT JUSTIFIED.

1. Petitioner's Question "1" Relating to Unilateral Appeal Was Not Timely Raised.

Petitioner admits (Petition, p. 8) that it raised the constitutional question as to "unilateral appeal" for the first time in its application for rehearing before the Su-

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(Continued from preceding page)

decided are found in the syllabus. Matter outside the syllabus is not regarded as decision. * * * Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge." (Emphasis, ours.)

This text is supported by Supreme Court of Ohio case-law cited in the footnotes and was recognized in *Perkins v. Benguet Mining Co.*, 342 U. S. 437, 441-442.

preme Court of Ohio after the judgment of the Court of Appeals had been affirmed. It is the settled rule of this Court that federal questions presented for the first time in an application for rehearing before the highest court of the state in which a decision could be had are not timely raised unless the state court actually entertains the petition and expressly passes upon the federal question or unless the question could not have been anticipated. In *Herndon v. Georgia,* 295 U. S. 441, 443, this Court said:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." (p. 443.)

While petitioner contends that this question first resulted because of the decision of the Ohio Supreme Court, it is clear that this is not so. Considering the syllabus the court decided only that the exceptors had no right of appeal on the subject matter presented. The question as to whether a board of directors of a sanitary district has any unilateral right to appeal was as inherent in the case at its inception as it is today. The original Sanitary District Act, 108 Ohio Laws, p. 654, Section 37, (as R. C. 6115.41 now does), granted *capacity* to such boards to appeal from orders of courts of common pleas, but in other sections the Act limits *subject matters* that are reviewable and regulates channels of appeal. If there were any constitutional question involved here it would arise from the language of the statute and not from the decision of the Ohio Supreme Court. There being no excuse for petitioner's failure to raise this federal question in a timely manner, this Court cannot be expected to consider it. *American Surety Co. v. Baldwin,* 287 U. S. 156, 163-164.

2. Ohio Supreme Court Did Not Hold That Sanitary Districts Have Unilateral Right of Appeal and Review by This Court Now Would be Premature.

Since "the points decided are found in the syllabus" (*supra*, pp. 5-6), obviously the Supreme Court of Ohio decided that the petitioner did not have a right of appeal on the subject matter presented and did not decide that respondent had a right of appeal on such subject matter. The District had not appealed from the decree of the special sanitary district court. No question concerning its rights of appeal had been presented for decision. The opinions of this Court have stated:

> "We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so." *Adler v. Board of Education*, 342 U. S. 485, 496.

There is no reason to suppose that if the question ever is presented, the Supreme Court of Ohio will hold that the District has a right of appeal on subject matter as to which duly interested opposed parties cannot appeal; and, *a fortiori*, no reason to suppose that it will construe the Act as authorizing any unjustifiable classifications of procedural rights and thereby raise constitutional questions. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546; *Dohany v. Rogers*, 281 U. S. 362, 368-69; *Asbury Hospital v. Cass County*, 326 U. S. 207, 214-215.

If any occasion arises for the Supreme Court of Ohio to consider the appellate rights of a sanitary district, it would be *stare decisis* that parties in the position of the petitioners cannot, under the current Act, appeal from the special sanitary district court directly to a state court of appeals on subject matter like that covered by the appeal in this case. At the present time the question is moot; the

petitioner would not gain a right of appeal contrary to express provisions of the Act by convincing the courts that some one else also should not have appellate rights. In *Massachusetts v. Mellon*, 262 U. S. 447, the opinion of the court states:

> "The party who invokes the power (of the courts to disregard an unconstitutional enactment) must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (p. 488, matter in parentheses is ours for context.)

Judge Stewart's dicta, rightly read, do not express an opinion that sanitary districts can appeal directly to a Court of Appeals from any portion of a special court's decree approving a report by a board of appraisers. The appellants, including petitioner, had contended that Ohio G. C. 6602-68 (R. C. 6115.39) authorized their appeal to a Court of Appeals notwithstanding the limitations, prohibitions and regulations of G. C. 6602-65 and 6602-66 (R. C. 6115.36 and 6115.37). The last paragraph of Judge Stewart's opinion (Petition, p. 77a) expresses his view that a special district court's decree approving the report is "final and incontestable except as to an award of compensation or damages." The appeal on these matters is to a court of common pleas for a jury trial whereas districts are, by G. C. 6602-70 (R. C. 6115.41), granted *capacity* to appeal from orders of common pleas courts pursuant to *any section of the entire Act "not requiring* the intervention of a jury." There are many potential situations not dependent upon decrees approving appraisers' reports from which boards might want to appeal. They might want to appeal from the judgments *following* the jury

trials authorized by G. C. 6602-66 (R. C. 6115.37). The General Assembly of Ohio was disposed to grant the necessary capacity.

We have emphasized in the preceding paragraph the distinction between the grant of *capacity* to appeal and authority to carry up particular *subject matter*. If it were not for the grant in G. C. 6602-70 (R. C. 6115.41) to districts of capacity to appeal, it might have been arguable that districts did not have a right to appeal any subject matter at any time as in *Miller v. B. U. C.*, 160 Oh. St. 561 where the court stated:

> "As a general rule an administrative agency has no partisan interests in its decisions. Unless there is express statutory authority therefor, an agency may not appeal from a judgment which, in effect, vacates its decision." (p. 563.)

Accord: *Corn v. Board*, 160 O. S. 9, 19.

Decrees of special sanitary district courts approving reports by boards of appraisers are, of course, within the generality of "any order" under the Act, but the prohibitions upon which Judge Stewart and the Ohio Supreme Court relied were in relation to particular subject matters and would prevail over the general capacity with which the districts are endowed. As Mr. Justice Holmes stated in *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379:

> "The language so far as it affects the present case is pretty sweeping but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used." (p. 383.)

3. Petitioner's Question "2" Did Not Reach the Supreme Court of Ohio in Form for Review by This Court.

The petition asserts that the decree of the special court assesses the total cost of this improvement against only a portion of the property which will be benefited thereby. (Question "2," Petition, p. 3.) The facts expressed in these conclusions, the petitioner asserts, deprived it of property without due process of law and deprived it of equal protection of the law. The petitioner does not contend that the Sanitary District Act is deficient but only that the appraisers and special court did not follow the petitioner's interpretation of the Act and thereby erred with resulting violation of federal rights. There is no claim of fraud or lack of hearings.

Since the Court of Appeals dismissed petitioner's appeals for want of appealable subject matter, and the propriety thereof has been affirmed by the Supreme Court of Ohio, the opinion and judgment of the special sanitary district court has stood for more than ninety days, for more than sixteen months, without any petition to this Court on federal grounds and even now the petition seeks a writ directed to the Supreme Court of Ohio. It would, therefore, be too late and out-of-place to issue a writ to the special sanitary district court on this assigned ground. (28 U. S. C. § 1257 and § 2101c; *Ohio ex rel. Bryant v. Park District,* 281 U. S. 74, 80-81.)

The merits or lack of merit in these points of the petitioner is immaterial because if the petitioner had no right of appeal, the order of the special court on March 19, 1953 is too venerable for review, and if the petitioner did have a right of appeal within the Ohio hierarchy of courts by virtue of *United States* law, then these points would

have first to be considered by the Ohio appellate courts. When similar questions were tendered in respect to the decision in *Beck v. Drainage District,* 8th C. C. A., 46 F. 2d 632 (annotated in 84 *A. L. R.*, pp. 1098-1110) this Court denied certiorari, 284 U. S. 618.

CONCLUSION.

The state of Ohio, to use language of Mr. Justice Cardozo in the opinion of the court in *Snyder v. Massachusetts,* 291 U. S. 97, 105,

> "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (p. 105.)

No such federal question of substance is presented by the record herein. Right of appeal is not guaranteed by the Constitution of the United States. *Ohio ex rel. Bryant v. Park District, supra,* 281 U. S. 74, 80-81. State grounds, legitimate construction of an Ohio statute, are broad enough to sustain the decision.

Whether the respondent has any unilateral rights of appeal and if so, whether the classification is unjustifiable are moot questions which were not raised timely and which this Court need not resolve until presented by a party who would be affected by the answer.

Time for review of the decree of the special sanitary district court in respect to petitioner's point "2" elapsed long ago and is not even sought now. Those matters were not considered by any other Ohio court.

It is respectfully submitted that the petition should be denied.

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